Error to Law and Equity Court of City of Richmond.

Action by T. A. Cary against the Northwestern Mutual Life Insurance Company. From judgment for defendant on demurrer to plaintiff's evidence, plaintiff brings error. Affirmed.

Lucius F. Cary and *W. R. Meredith,* both of Richmond, for plaintiff in error.

Munford, Hunton, Williams & Anderson, of Richmond, for defendant in error.

GRAHAM *v.* COMMONWEALTH.

June 10, 1920.

[103 S. E. 565.]

1. Criminal Law (§ 595 (6)*)—Continuance for Absent Witnesses Who Would Have Testified to Immaterial Matters Properly Denied.—Where accused expressly testified that he shot deceased only in self-defense, although the disagreement leading up to the killing arose from deceased's act in arresting accused's sister, continuance on account of the absence of witnesses who would have testified that the arrest was because of deceased's personal ill will toward the sister was properly refused; the testimony being immaterial.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 286.]

2. Homicide (§ 191*)—Deceased's Motive in Arresting Accused's Sister Immaterial, Where Accused Claimed Self-Defense.—Where accused testified he shot deceased only in self-defense, evidence tending to show that deceased's arrest of accused's sister, which led to the encounter, was on account of malice toward her, was immaterial.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 140.]

3. Homicide (§ 188 (7)*)—Deceased's Habit as to Swearing Admissible to Rebut Accused's Testimony That He Swore at Accused.—To rebut testimony of accused, claiming self-defense, that when deceased advanced toward accused, reaching for his gun, he used violent, and abusive language, evidence of deceased's nonhabit of swearing was admissible.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 145.]

4. Criminal Law (§ 683 (2)*)—Immaterial Evidence Rebuttable to Prevent Prejudice.—If at the instance of one party, evidence has been admitted, unobjected to, which is immaterial, then, where such action is needed for removing an unfair prejudice which might otherwise ensue from the original evidence, it is a proper exercise of judicial discretion to admit evidence in rebuttal of such immaterial evidence.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 300.]

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

5. Homicide (§ 301*)—Where Self-Defense Only Was Claimed Instructions on Defense of Sister Properly Refused.—Where accused expressly testified that he shot in self-defense, instructions as to his right to resist deceased's unlawful arrest of his sister, and deceased's failure to afford her opportunity to prepare bail, were properly refused, as inapplicable to any material issue.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 158, et seq.]

6. Criminal Law (§ 404 (4)*)—Clothing of Deceased Held Properly Admitted in Evidence.—In a murder trial where self-defense was claimed, deceased's clothing, showing the position of bullet holes and of the hip pocket, was properly admitted as bearing on whether the position of accused was, at the time of the killing, such that he could have seen, as claimed, "the bright metal looking like a pistol," with the right hand of deceased on it in his hip pocket.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 146.]

7. Homicide (§ 253 (1)*)—Evidence Held Sufficient to Show First Degree Murder.—In view of Code 1910, § 6363, evidence held to support conviction of murder in the first degree.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 147 et seq.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, Wise County.

John Graham was convicted of murder, and brings error. Affirmed.

D. F. Kennedy, of Youngstown, Ohio, for plaintiff in error.

Jno. R. Saunders, Atty.-Gen., and *J. D. Hanks, Jr., Asst. Atty.-Gen.,* for the Commonwealth.

TURNER *v.* MONTEIRO et al.

June 10, 1920.

[103 S. E. 572.]

Wills (§§ 607 (1), 608 (3)*)—Devise to Two Sons and "Descendants" Held to Create Joint Fee under Rule in Shelley's Case; "Heirs of the Body;" "Issue."—Will executed in 1846, devising land to two named sons "during their lifetime * * * to hold it jointly and after the death of the last of the two to their descendants, if they have any, if not" to another son or his descendants "without restriction," held to give the first-named sons, by operation of the rule in Shelley's Case, an estate tail, which was converted by the statute into a fee simple, so that each son took a joint fee in the land devised; the

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.